Supreme Court, U.S.
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No. 96-345

In the Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD GREENE AND JOYCE GREENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when the government unsuccessfully contended in a prior suit with the taxpayer that a particular transaction was subject to tax, the doctrine of collateral estoppel bars the government thereafter from asserting in a subsequent suit involving later tax years of the taxpayer that a similar transaction is subject to tax under a legal theory that was not presented and not addressed in the first suit.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 79 F.3d 1348. The opinion of the district court (Pet. App. 25a-46a) is reported at 864 F. Supp. 407.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1996. A petition for rehearing was denied on June 4, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. During 1974 and for several years thereafter, petitioners Leonard and Joyce Greene made contributions of futures contracts owned by them to the Institute for Socioeconomic Studies, a tax-exempt private foundation that Mr. Greene had founded. The Internal Revenue Service issued a private ruling which determined that petitioners were entitled to a charitable contribution deduction for the fair market value of the donated contracts and that petitioners would not realize any gain or loss on the Institute's subsequent sale of the contracts (Pet. App. 6a).

The availability of this favorable tax treatment for the donation of futures contracts was altered by the 1981 amendment to the Internal Revenue Code, which added Section 1256(a). Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 503(a), 95 Stat. 327. As amended, Section 1256 provided (i) that all commodities futures contracts acquired, and positions established after, June 23, 1981, were to be marked to market at year end and (ii) that gains (or losses) in such contracts or positions, regardless of how long they had been held, would be characterized as 60 percent long-term and 40 percent short-term capital gains (or losses). 26 U.S.C. 1256(a). In addition, Section 170(e)(1) of the Code (as in effect after 1969) required the allowable deduction for charitable contributions to be reduced by the amount of short-term capital gain that would have been realized by the donor if he had sold the property on the date that the donation was made. 26 U.S.C. 170(e)(1) (1970 ed.).

2. In an attempt to avoid the combined effect of these provisions for gifts to the Institute in the years 1982-1987, petitioners purported to convey only the

long-term capital gains interest in the futures contracts, purporting to retain the short-term capital gains interest for themselves. On their federal tax returns for those years, petitioners claimed charitable contribution deductions for the 60 percent long-term capital gains portion of the contracts and included in their gross income the 40 percent short-term capital gains portion of the contracts.

Upon audits of those returns, the Internal Revenue Service determined that petitioners were required to include in their gross income the long-term capital gains portion of the donated contracts as well as the short-term capital gains portion. That determination was reflected in two notices of deficiency sent to petitioners. The first notice was sent in 1990 and pertained only to the 1982 tax year. The second notice was sent in 1992 and covered the 1983-1987 tax years (Pet. App. 6a-7a).

3. Petitioners paid the 1982 deficiency and brought a refund suit in federal district court. The government maintained that petitioners' purported contribution of the long-term capital gains portion of the futures contracts was an anticipatory assignment of income that was ineffective to permit them to avoid the incidence of tax on the donated portion of the sale proceeds (Pet. App. 7a). See *Lucas* v. *Earl*, 281 U.S. 111 (1930).

The district court disagreed. It held that petitioners had made a contribution of a discrete property interest in the futures contract and not merely a contribution of a portion of the proceeds to be realized by the Institute upon the subsequent sale of the contracts. *Greene* v. *United States*, 806 F. Supp. 1165 (S.D.N.Y. 1992). On appeal, the Second Circuit affirmed. 13 F.3d 577 (1994). The court of appeals

concluded that the critical fact was that taxpayers had transferred complete control over the contracts to the Institute, which had sole discretion to determine when and if to sell the contracts. *Id.* at 581-582.

As an alternative to the contention that petitioners had made an anticipatory assignment of income, the government contended in its brief on appeal that, if petitioners had made a complete transfer of a property interest in the contracts (as the district court had held), then petitioners were required by Section 1256(c)(1) of the Internal Revenue Code to recognize all of the gain that would have been realized if the contracts had been sold on the dates that they were transferred to the Institute. The court of appeals refused to consider the government's argument under Section 1256(c)(1), however, because that issue had not been raised or addressed in the district court. 13 F.3d at 585-586.

4. After paying the asserted deficiencies for the 1983-1987 tax years, petitioners then commenced this (second) refund suit in district court. The government argued in district court that petitioners' charitable contributions of their interests in the futures contracts to the Institute effected a termination of all their rights with respect to the contracts within the meaning of Section 1256(c)(1), and that petitioners were therefore required under Section 1256(a)(1) to include in their gross income for the years in issue all of the gain inherent in those contracts on the dates of the contributions. Petitioners disagreed with that contention and further argued that the decision in the first refund suit—involving the 1982 tax year—collaterally estopped the government from raising this new issue (Pet. App. 8a-9a, 30a-35a).

The district court rejected the suggestion that collateral estoppel bars the government from raising a new issue in a new tax year. The court noted that this refund suit involves different tax years than the first suit and is therefore a separate and distinct cause of action. The court concluded that, in the second refund suit, the doctrine of collateral estoppel precludes the government only from relitigating issues that had actually been litigated and decided in the first suit. Because the question whether transactions of this type were subject to Section 1256 had not been litigated or addressed in the first suit, the court concluded that the government was not precluded from litigating that issue now (Pet. App. 34a-35a). The court ultimately concluded, however, that petitioners were correct on the merits of the Section 1256 issue and therefore entered judgment in petitioners' favor (Pet. App. 41a-46a).

5. The court of appeals agreed with the district court that the decision in the first suit did not collaterally estop the government from pursuing its Section 1256 claim in this case. The court of appeals noted that the government had attempted to raise Section 1256 as an alternative basis for reversal of the district court's judgment on appeal in the first refund case but that the court of appeals, in the exercise of its discretion, had declined to consider that issue because it had not been raised in the district court. The court noted that, in these circumstances, it could not be said that the government was attempting to relitigate a matter that already had been decided against it in the first case (Pet. App. 8a-12a). The court explained that (*id.* at 12a):

> while the evidence involved in the two cases is essentially the same, the government's new argument involves application of entirely different rules than those involved in the initial litigation. The earlier litigation dealt with the anticipatory assignment of income doctrine and the step transaction doctrine. There was no discussion of the merits of the § 1256 question. This litigation, then, poses wholly distinct questions than those involved and decided in *Greene I*.

The court then proceeded to hold for the government on the merits of the Section 1256 issue (Pet. App. 13a-24a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[1]

1. a. This Court held almost 50 years ago that "[e]ach [tax] year is the origin of a new liability and of a separate cause of action." *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948). The doctrine of *res judicata*—or claim preclusion—therefore does not prevent successive tax litigation between the government and the same taxpayer when each suit involves different tax years. *Ibid.* See also *Montana* v. *United States*, 440 U.S. 147 (1979). By contrast, the doctrine of collateral estoppel—or issue preclusion—*may* have application in a subsequent suit between the government and the same taxpayer. But collat-

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[1] Petitioners do not seek review of the portion of the decision of the court of appeals that upholds the government's application of Section 1256 on the merits.

eral estoppel serves only to bar relitigation in a subsequent suit of those issues that were actually litigated and decided in a prior suit between the same parties. As this Court stated in *Montana* v. *United States*, 440 U.S. at 153 (emphasis added), "[u]nder collateral estoppel, once an issue is *actually* and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." See also *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979).

b. Because the first refund suit involved only petitioners' 1982 tax year, it obviously does not bar (as *res judicata*) the present litigation, which seeks a refund of taxes paid in their 1983-1987 tax years. Each tax year creates a separate cause of action.

The doctrine of collateral estoppel is also not applicable in this case because the issues raised and addressed in the first refund case are not raised or addressed in this case. The first case decided that petitioners' contribution in 1982 of certain future contracts did not involve an anticipatory assignment of income but instead effected a completed transfer of a discrete property interest in the contracts. 13 F.3d at 581-582. The present case involves the tax consequences of petitioners' contribution of *different* futures contracts in *different* years (1983-1987) and the government did not seek to relitigate in this case the anticipatory assignment of income theory previously decided against it. Instead, in the present case, the government raised a different issue, contending that petitioners were required to recognize gain on their transfers of futures contracts in the years 1983-1987 under Section 1256 of the Code.

Indeed, in the present case, the government fully accepted the holding in the first case that petitioners' method of contribution effected a completed transfer of a discrete property interest in the futures contracts. The government maintained that, under Section 1256(a) and (c), the necessary consequence of such a completed transfer was that petitioners must recognize the gain that they would have realized if they had sold the contracts for their market value on the date that the contracts were transferred—an issue that was not considered by either court in the prior litigation.

As both courts below correctly ruled, because the government's claim under Section 1256 was not actually litigated and decided in the prior refund case, the government is not collaterally estopped from raising that issue in this case.[2]

c. Petitioners contend (Pet. 7-12) that the doctrine of collateral estoppel bars the government from relying on Section 1256 to require the recognition of gain on their contributions of future contracts in the 1983-1987 tax years because the government *could* have raised that issue in the prior litigation involving similar contributions in their 1982 tax year. The doctrine of collateral estoppel, however, unlike *res judicata*, bars only the relitigation of matters *actually* litigated and decided in a prior suit between the

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[2] The government belatedly attempted to raise the Section 1256 issue on appeal in the first case, but the court of appeals declined to consider it because it had not been raised in the district court. 13 F.3d at 585-586. In the present case, the court of appeals correctly noted that the government is not estopped from raising an issue that had not been actually litigated and resolved in the prior litigation (Pet. App. 10a-12a).

same parties involving a different cause of action. *Montana* v. *United States*, 440 U.S. at 153. It does not bar a party from litigating, in a subsequent action, an issue that could have been, but was not, actually litigated in a prior suit between the same parties. *Ibid.* This principle has particular force in the present context, for this case involves not only different tax years than the first case but also involves entirely new and distinct transactions.

Contrary to petitioners' claim (Pet. 12), this Court's decision in *Montana* v. *United States* does not support a more expansive concept of collateral estoppel. The Court held in that case that a suit between a government contractor and the State of Montana concerning the constitutionality of the State's gross receipts tax collaterally estopped the government from thereafter challenging the constitutionality of that tax in a second suit because (i) the government had exercised control over the prior suit and (ii) the government was seeking to raise the same issues that had been actually litigated and decided against it in the prior suit. Nothing in that decision supports petitioners' claim that collateral estoppel bars the government from relying on a new and distinct legal issue in a subsequent case against the same taxpayer when the government might have, but did not, succeed in raising that issue in the prior suit involving a different tax year and different transactions. As this Court held in *Montana* v. *United States*, collateral estoppel applies only to matters "actually and necessarily determined" in a prior suit between the same parties. 440 U.S. at 153.

2. Petitioners further err in contending (Pet. 7-10) that the decision in this case conflicts with *Kamilche Co.* v. *United States*, 53 F.3d 1059 (1995), modified, 75

F.3d 1391 (9th Cir. 1996), and *Yamaha Corp.* v. *United States*, 961 F.2d 245 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993).

a. *Kamilche Co.* involved a taxpayer's entitlement to a charitable contribution deduction for certain real property the taxpayer claimed to have donated to the State of California. The Commissioner contended that the State of California had acquired title to the property by adverse possession prior to the time of the taxpayer's purported donation and that the taxpayer therefore was not entitled to a charitable contribution deduction with respect to the property. The Ninth Circuit held, however, that the taxpayer's ownership of the property had been conclusively determined in a prior condemnation proceeding instituted by the United States against the taxpayer that concerned a small portion of the tract needed for a federal highway bypass. In that prior case, the taxpayer had received judgment against the United States for $300,000. The court held, in the subsequent case involving the charitable donation of the remaining portion of that land, that the government was collaterally estopped from contesting the taxpayer's ownership of the property. The court held that it did not matter that the government had not raised an adverse possession argument in the prior proceeding because the issue of the taxpayer's ownership of the property had been actually litigated and necessarily decided in the earlier suit. 53 F.3d at 1062-1063.

The present case differs markedly from *Kamilche Co.* In the 1982 tax year litigation, the court held that petitioners made completed transfers in 1982 of discrete property interests in their futures contracts and had not simply made anticipatory assignments of the income to be realized upon the subsequent sale of

the contracts. In the present suit involving the 1983-1987 tax years, the government did not collaterally attack the decision that petitioners had made completed transfers of property. Instead, the government affirmatively relied on that earlier holding as the basis for the new claim that, because petitioners *had* transferred their interests in the futures contracts, they were required under Section 1256 to recognize the gain inherent in those contracts. Unlike the question of title in *Kamilche Co.*, the question of liability under Section 1256 had not actually been litigated and decided in the prior suit.

b. The decision of the District of Columbia Circuit in *Yamaha Corp.* is also not in conflict with the decision in this case. In *Yamaha Corp.*, the plaintiff brought suit against the United States, contending that certain regulations of the United States Customs Service were invalid under the Tariff Act of 1930 and under the Trademark Act of 1946. The court of appeals held that the plaintiff was collaterally estopped from litigating the validity of those regulations because the plaintiff had unsucessfully litigated that same issue in a prior suit. Although the plaintiff attempted to advance new arguments in support of its claim that the regulations were invalid, the court held that the plaintiff was precluded from contesting the same regulations on the basis of arguments that were advanced by to it in the prior proceeding. 961 F.2d at 254-258.

Unlike the situations in *Kamilche Co.* and *Yamaha Corp.*, the government has not sought in this case to relitigate a cause of action or an issue that was previously adjudicated in a prior suit. Instead, as we have explained above, the government relied on the decision in the prior suit as the underlying basis for

its claim in this case that petitioners were required under Section 1256 to recognize gain on the futures contracts they donated in the years 1983-1987. Nothing in *Kamilche Co.* or *Yamaha Corp.* suggests that the doctrine of collateral estoppel precludes a losing party from accepting the decision in the prior case and raising a new claim for relief in a later suit involving a different transaction and a different cause of action.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996

[3] None of the additional cases cited by petitioners (Pet. 11 n.3) conflicts with the decision in this case.